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No. 88-1161

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In the Supreme Court of the United States

OCTOBER TERM, 1988

JAMES JOHN DORNHOFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether federal agents executing a lawful search warrant for child pornography properly seized books and magazines not covered by the warrant on the ground that those materials constituted evidence that petitioner had unlawfully received the materials that were the subject of the warrant.

2. Whether the evidence was sufficient to establish that the child pornography received by petitioner had been transported in interstate commerce or mailed.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 23a-40a) is reported at 859 F.2d 1195.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1988. A petition for rehearing was denied on November 14, 1988 (Pet. App. 41a-42a). The petition for a writ of certiorari was filed on January 12, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted

of receiving child pornography, in violation of 18 U.S.C. 2252(a)(2). He was placed on probation for two years and was fined $1,000.

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 24a-27a). It showed that the government set up the Far Eastern Trade Company with a post office box in the Virgin Islands to solicit orders for child pornography from persons suspected of being consumers of such material. This sting operation targeted petitioner after the United States Customs Service seized some items of child pornography that were addressed to him. Far Eastern sent a letter to petitioner offering to provide a catalog of pornographic materials involving children. Petitioner responded, and Far Eastern forwarded the catalog. Petitioner then ordered *Lolita Sex* and *Children Love* from Far Eastern and enclosed a check for $45. Pet. App. 24a-25a.[1]

In response to petitioner's order, a postal inspector in New Jersey sent the pornographic materials in an unsealed envelope with a Virgin Islands postmark to Robert Northrop, a postal inspector in Washington, D.C. Northrop sealed the envelope and arranged for it to be delivered to petitioner by the letter carrier normally assigned to the Arlington, Virginia, route that includes petitioner's address. Pet. App. 25a-26a, 28a. Inspector Northrop also obtained an anticipatory search warrant for petitioner's residence, conditioned on Northrop's placing the child pornography in the mail. Government agents observed petitioner remove the material from his mail box

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[1] *Lolita Sex* was described in the catalog as depicting explicit sexual acts by girls between the ages of 8 and 15. *Children Love* was described as depicting "[girls] and boys from 4 years to 15 years in group orgies with adults." It was also advertised as depicting a nine-year-old girl performing oral sex on her father. Pet. App. 24a-25a.

and take it into his apartment. Shortly thereafter, the agents executed the search warrant and recovered the two child pornography magazines.

In the course of their search, government agents found and seized a notebook made by petitioner that included pictures of nude children as well as several novels and magazines featuring sexual activity by minors. Petitioner's theory of defense at trial was that he had ordered the two magazines that were the subjects of the search warrant without realizing that they contained child pornography. The notebook, the novels, and the other magazines seized from petitioner's apartment were offered by the government to rebut that defense by showing that petitioner intended to receive child pornography. Pet. App. 26a-27a, 34a-35a.

2. On appeal, petitioner challenged the seizure and admission into evidence of the notebook containing pictures of nude children and the novels and other magazines found in his apartment on the ground that their seizure was not specifically authorized by the search warrant. In rejecting that claim, the court of appeals relied (Pet. App. 34a) on this Court's holding in *Andresen* v. *Maryland*, 427 U.S. 463, 483 (1976), that police may seize evidence discovered in plain view in the course of executing a warrant where the evidence "will aid in a particular apprehension or conviction." The court found that the items in question here were properly seized as evidence of petitioner's "predisposition toward child pornography as well as his lack of mistake when he ordered the child pornography in question" (Pet. App. 35a).

The court of appeals also rejected petitioner's contention that the evidence at trial did not establish that the

child pornography had "been transported or shipped in interstate or foreign commerce or mailed," as required by 18 U.S.C. 2252(a)(2). After describing the course of the material from New Jersey to petitioner's mail box in Arlington, Virginia, the court concluded (Pet. App. 29a) that "the child pornography was 'mailed' within the meaning of the statute." In reliance on its previous opinion in *United States* v. *Goodwin*, 854 F.2d 33 (4th Cir. 1988), the court also rejected (Pet. App. 30a) petitioner's claim that federal jurisdiction had been artificially manufactured by the government.

ARGUMENT

1. Petitioner contends (Pet. 14-18) that the government improperly seized the notebook containing pictures of nude children, as well as the novels and the other magazines found in his apartment, because those materials were not covered by the search warrant. Petitioner does not, however, dispute the general proposition that police may seize any item observed during the conduct of a lawful search when they have probable cause to believe that that item constitutes evidence of a crime. See, *e.g.*, *Arizona* v. *Hicks*, 480 U.S. 321, 325-326 (1987); *Warden* v. *Hayden*, 387 U.S. 294, 300-310 (1967). Nor does petitioner challenge the relevance of the materials at issue in this case as evidence of his predisposition and intent to receive child pornography. Rather, he argues that otherwise probative evidence discovered in plain view during the execution of a lawful warrant cannot be seized if the seizure would implicate First Amendment values. That proposition is untenable.

To be sure, the First Amendment does impose special constraints on searches for and seizures of allegedly obscene material. See, *e.g.*, *Maryland* v. *Macon*, 472 U.S.

463, 468 (1985). Thus, in *Roaden* v. *Kentucky*, 413 U.S. 496, 497 (1973), the Court held that, without a warrant, allegedly obscene material may not be seized incident to an arrest for the public exhibition of that material. And in *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961), the Court held that a warrant to seize allegedly obscene material must state with particularity the items to be seized and may not issue merely on the officer's conclusory assertion that the materials in question are obscene. Relying on these and other cases, the Ninth Circuit in *United States* v. *Hale*, 784 F.2d 1465, 1469, cert. denied, 479 U.S. 829 (1986), held that the plain view exception to the warrant requirement "cannot be used to * * * seize alleged obscenity or alleged child pornography that is unspecified in the warrant."[2]

The instant case, however, is not in direct conflict with the Ninth Circuit's decision in *Hale*. Unlike the materials in *Hale*, the materials at issue in this case were not subject to seizure solely because the officers believed they were obscene or constituted child pornography; rather, regard-

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[2] The Ninth Circuit relied principally on a footnote in this Court's opinion in *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319, 326 n.5 (1979). The Court said there that, although "contraband may be seized without a warrant under the 'plain view' doctrine[,] * * * we have recognized special constraints upon searches for and seizures of material arguably protected by the First Amendment * * *; materials normally may not be seized on the basis of alleged obscenity without a warrant." That footnote obviously was not intended to decide the question whether obscene materials can be seized under the plain view doctrine, because the Court in the accompanying text expressly stated that it had "no occasion to decide whether in this context the 'plain view' doctrine might be applicable" (*id.* at 326). *A fortiori*, the footnote in *Lo-Ji* does not address the question presented in this case: whether the plain view seizure is justified not simply to suppress allegedly obscene or pornographic materials, but because the evidence seized is relevant to a prosecution for the receipt of other, lawfully seized materials.

less of whether their possession or receipt independently violated the law, the materials seized in this case were subject to seizure because they were evidence of petitioner's unlawful intent with respect to the receipt of the materials identified in the warrant. See *Andresen* v. *Maryland*, 427 U.S. at 483. The Ninth Circuit in *Hale* was concerned (784 F.2d at 1469) that, if the plain view doctrine applied to allegedly obscene materials, "police officers could seize any publication or film they deem to be unprotected by the First Amendment, thereby subverting the higher procedural standards that require a neutral magistrate to make the initial determination of probable cause as to specific items." But, since this is not a case in which the postal inspectors used the plain view doctrine simply in order to suppress publications on the basis of the officers' judgment that they were obscene or constituted illegal child pornography, there is no occasion to apply the "particularized rules" governing such seizures. *Maryland* v. *Macon*, 472 U.S. at 468. To be sure, the Ninth Circuit in *Hale* did not limit its decision in recognition of the distinction we are suggesting here. Because the evidence in that case was seized solely because of its allegedly unlawful character, however, there was no occasion to consider whether the plain view seizure would have been justified if the evidence had been subject to seizure because of its probative value in a prosecution for the receipt of other materials that had already been found to be contraband.

The seizure of evidence relevant to intent and predisposition should not be subject to special restrictions under the Fourth Amendment whenever such evidence implicates First Amendment interests. Otherwise, police officers executing a search warrant for a bomb at a terrorist's home could not seize, in plain view, an engineering magazine that explained how to build explosive devices simply because the magazine itself would be presumptively

protected by the First Amendment. Petitioner cites no support for a proposition that is not only untenably broad but would also not serve any articulated First Amendment purpose.

2. Petitioner contends (Pet. 18-21) that the evidence failed to establish that the child pornography he received had been "transported or shipped in interstate or foreign commerce or mailed," as required by 18 U.S.C. 2252(a)(2). The government introduced evidence that a postal inspector in New Jersey mailed the two magazines to Inspector Northrop in Washington, D.C. Pet. App. 28a. Northrop prepared the package and arranged for it to be given to the letter carrier who normally delivered the mail to petitioner's residence in Arlington, Virginia. The carrier then placed the package in petitioner's mailbox, where petitioner retrieved it. This evidence was plainly sufficient to satisfy the jurisdictional requirement of 18 U.S.C. 2252(a)(2).[3]

Petitioner alternatively suggests (Pet. 21) that the postal inspectors artificially manufactured jurisdiction by placing the pornography in the mail. This is not, however, a case in which law enforcement officers performed wholly

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[3] Petitioner mistakenly relies on *United States* v. *Ferguson*, 778 F.2d 1017 (4th Cir. 1985), cert. denied, 476 U.S. 1123 (1986), to support his assertion (Pet. 20) that the pornography was never in the "regular stream of mail." In that case, two postal employees were convicted for opening parcels that had been planted by postal inspectors. The court held (778 F.2d at 1020) that the jury was properly instructed that it had to find that the defendants destroyed mail that was not directed to them, that a "test or decoy" parcel could be considered mail, and that the uncontradicted evidence was that the decoy parcel had been introduced into the "regular stream of mail." Here, the pornography entered the regular stream of the mail both when it was sent to Inspector Northrop and when it was turned over to the letter carrier for delivery to petitioner.

unnecessary actions in order to establish jurisdiction. Compare, *e.g.*, *United States* v. *Brantley*, 777 F.2d 159, 163 (4th Cir. 1985), cert. denied, 479 U.S. 882 (1986); *United States* v. *Archer*, 486 F.2d 670 (2d Cir. 1973). To the contrary, the use of the mail was a necessary element of the sting operation, since the postal inspectors could not convincingly have delivered these materials in person. Moreover, having ordered the materials from a mail order catalog with a Virgin Islands address, petitioner could hardly be surprised that the mail was used to deliver the materials to him. The use of the mail was a natural and inevitable part of the transaction, and by his own actions petitioner invited its use.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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